Supreme Court, U. S.
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IN THE

Supreme Court of the United States

NO. 77-704

JOHN WILLIAM GIBBS,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[redacted]

EDWARD T. M. GARLAND
MARK J. KADISH

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NO.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

The petitioner, JOHN WILLIAM GIBBS, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On August 17, 1977, the United States Court of Appeals for the Fifth Circuit affirmed the conviction in this case per curiam without an opinion. See Appendix A. On October 4, 1977, the United States Court of Appeals for the Fifth Circuit denied Petitioner's Motion for Rehearing and Rehearing En Banc. See Appendix B.

JURISDICTION

Jurisdiction of this appeal is grounded in an August 17, 1977 decision of the United States Court of Appeals for the Fifth Circuit and a October 4, 1977 Denial of Petition of Rehearing by the United States Court of Appeals for the Fifth Circuit. The Statutory provision conferring jurisdiction for this appeal is 28 U.S.C. 1254.

QUESTIONS PRESENTED FOR REVIEW

1. **Is the Government guilty of "overreaching" so as to bar a retrial under the double jeopardy clause of the Fifth Amendment of the United States Constitution, when the testimony of the chief prosecution witness, a law enforcement officer and "case agent" forces a defendant to move for and be granted a mistrial?**

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

PREFATORY STATEMENT

Appendix C contains the entire transcript of the abbreviated first trial. Appendix D contains the testimony at the hearing on Appellant's Motion to Dismiss on the grounds, that if retried, the Appellant would be twice placed in jeopardy. All references to these transcripts will be referred to by Appellant as either C or D, whichever the case may be.

STATEMENT OF THE CASE

On November 23, 1976, Appellant was arrested and charged with a series of drug transactions, which allegedly occurred on April 22, 1976, April 23, 1976, and May 12, 1976.

His first jury trial began on January 12, 1977 in the United States District Court for the Middle District of Georgia, Athens Division, the Honorable J. Wilbur Owens, United States District Court Judge presiding.

The Government's chief witness and "case agent", J. J. Biello, was allowed to remain in the courtroom to assist the Government and was present from the start of the trial until the Judge granted a mistrial.

Biello was a detective on the Atlanta Police Department Narcotic's Division, assigned to the Federal Drug Enforcement Agency Task Force [C-23].

The first two witnesses for the Government, a Larry Wheeler [C-1] and Ronald Haney [C-14], were chemists working for the Georgia State Crime Laboratory.

On direct testimony, they testified to the contents of certain parcels given to them by Detective Biello [Wheeler C-1, C-7] [Haney C-14, C-17].

On cross examination by Appellant's counsel, the fact was brought out that nowhere in either chemist's report did the Appellant Gibb's name appear.

Rather, the name of a co-defendant who had pleaded guilty, one Thomas Bryant, was the only name appearing on the folders containing not only the reports, but the contraband itself [Wheeler C-11] [Haney C-19]. Further, the reports were dated May 20, 1976, a week or so after the last date mentioned in the Indictment and almost a

month after the first incident [Wheeler C-11] [Haney C-19].

Bryant had had a history of drug abuse and Appellant's counsel was obviously attempting to show that the reports and contraband were not connected in any way with his client, at least as far as the official records of the State of Georgia were concerned [Wheeler C-8] [Haney C-18].

At the end of these forensic chemists' testimony, it was obvious that the Government's case was not going well.

Detective Biello was the next witness [C-23]. After a few preliminary questions, Biello was asked whether he knew the defendant [C-24]. He identified Gibbs and said he had been introduced to him by Thomas Bryant [C-24]. He began narrating the sequence of events leading up to the introduction. The United States Attorney asked Biello the following question:

> Q. When did he [Bryant] tell you who his main man was?
>
> A. Well, when we were traveling on I-20 eastbound towards Madison, Mr. Bryant was telling me all about himself and Billy, how they went back ten years ago. *They were partners and that they were safe burglars* — —.

At this point the Court interrupted the proceedings, counsel for Appellant made a motion for a mistrial, which the Court granted [C-27].

Appellant made a timely Motion to Dismiss [D-1]. At the hearing on this motion, the Court allowed Appellant's counsel to question Biello [D-2]. From Biello's testimony, it appeared he was an experienced police officer [D-3] with a year of college [D-5], who had testified frequently in Court [D-3]. Biello had never checked as to the authenticity of Bryant's statement [D-4] nor had he ever been able to find any police record showing that Appellant Gibbs [D-4] had been convicted of safe burglary.

Biello's answers to questions about blurting out other defendants police record when he had testified in previous trials was, to say the least, evasive [D-6] [D-4] [D-5]. His favorite reply was "I really don't know." [D-4] [D-5].

The detective admitted discussing the case with the trial prosecutor [D-7]. He tried to give the prosecution as much detail as possible [D-7], but could not remember whether he had mentioned the safe burglary remarks [D-7]. He *failed* to include the remarks in *any* of his reports [D-8].

The Assistant United States Attorney prosecuting the case was questioned by the Court [D-8, 9]. He denied being specifically told by Biello anything about the Appellant's safe burglary activities [D-9]. The Assistant United States Attorney had not cautioned Biello about testifying to any prior misconduct by the Appellant [D-10], even though the Government knew of some prior misconduct [D-9].

Later Appellant again stood trial, was convicted and was sentenced to 15 years in prison.

REASONS FOR GRANTING THE WRIT

A. THIS COURT SHOULD FURTHER REFINE *UNITED STATES V. DINITZ*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267. IT IS UNCLEAR FROM THE *DINITZ* OPINION WHETHER "OVERREACHING" IS LIMITED TO INTENTIONAL MISCONDUCT OR WHETHER IT WOULD EXTEND TO GROSS NEGLIGENCE ON THE PART OF JUDGE,

PROSECUTOR OR PROSECUTOR'S CASE AGENT LEADING TO THE GRANT OF A MISTRIAL.

It is conceded that jeopardy had attached when the first jury was selected and sworn. However, "in cases in which a mistrial has been declared prior to verdict, the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the double jeopardy clause bars retrial." *Illinois v. Sommerville*, 410 U.S. 458, 467, 93 S.Ct. 1066, 1072, 35 L.Ed.2d 425, 433 (1973). The Fifth Amendment's prohibition against twice being placed in jeopardy is not absolute. Numerous exceptions have been recognized. See *Sommerville* above at 463, 93 S.Ct. at 1070, 35 L.Ed.2d at 430. Reprosecution is not barred after a conviction is reversed on appeal. *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896), or where it is set aside on collateral attack. *United States v. Tateo*, 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964). Mistrial declarations do not bar retrial when the jury is dismissed because they cannot reach a verdict, *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892), *United States v. Perez*, 22 U.S. [9 Wheat.] 579, 6 L.Ed. 165 (1824), due to the disqualification of a juror, *Thompson v. United States*, 155 U.S. 271, 15 S.Ct. 73, 39 L.Ed. 146 (1894), *Simmons v. United States*, 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968 (1891), or because of tactical necessity in wartime. *Wade v. Hunter*, 336 U.S. 684, 69 S.Ct. 834, 993 L.Ed. 974 (1949).

The Double Jeopardy Clause serves two important policy functions: the protection of the accused from Government harassment by multiple prosecutions on the same offense, See e.g. *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223, 2 L.Ed.2d 199, 204, 1957, and the protection of the accused's ". . . valued right to have his trial completed by a particular tribunal". *Wade*

v. Hunter, 336 U.S. at 689, 69 S.Ct. at 837, 93 L.Ed. at 978. See also *United States v. Jorn*, 400 U.S. 470, 486, 91 S.Ct. 547, 557, 27 L.Ed.2d 543, 557 (1971); *Downum v. United States*, 372 U.S. at 736, 83 S.Ct. at 1034, 10 L.Ed.2d at 102. Balanced against the rights of an accused embodied in the Double Jeopardy Clause is society's interest "in fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. at 689, 69 S.Ct. at 837, 93 L.Ed. at 978. See also *Illinois v. Sommerville*, 410 U.S. at 459, 93 S.Ct. at 1088, 35 L.Ed.2d at 428. This balance is reflected in the doctrine that where a mistrial is declared over a defendant's objection, the determination whether double jeopardy bars retrial depends on whether the mistrial declaration was warranted by "manifest necessity."

This phrase is derived from Justice Story's commentary in *United States v. Perez*, 22 U.S. at 580, 6 L.Ed. at 165, on a judge's inherent authority to declare a mistrial over the objection of the defendant:

> "We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion taking all the circumstances into consideration there is a manifest necessity for the act, or the end of public justice would otherwise be defeated."

See also *Illinois v. Sommerville, supra*, at 459, 93 S.Ct. at 1068, 35 L.Ed.2d at 428:

> "Different considerations obtain, however when the mistrial has been declared at the defendant's request."

United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267. In *United States v. Dinitz* above, a majority of the Supreme Court adopted the reasonings of the

plurality opinion in *United States v. Jorn*, 400 U.S. at 485, 91 S.Ct. at 557, 27 L.Ed. at 556:

> "If that right to go to a particular tribunal is valued it is because independent of the threat of bad faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for a mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. In the absence of such a motion, the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."

The *Dinitz* majority reasoned that where a mistrial is declared on defendant's motion in the face of judicial or prosecutorial error, the objectives of the Double Jeopardy Clause are accomplished without sacrificing the public interest in prosecuting individuals accused of violating the law.

> "It is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interest served by the Double Jeopardy Clause —the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions."

Although a defendant's motion for mistrial ordinarily forecloses the possibility that reprosecution will be barred by double jeopardy, in *United States v. Dinitz*, the Court distinguished between mistrials caused by judicial or prosecutorial error and those caused by judicial or prosecutorial "overreaching". It is unclear from the *Dinitz* opinion whether "overreaching" is limited to intentional misconduct or whether it would extend to gross negligence on the part of judge or prosecutor which led to mistrial. Cf. comment, Double Jeopardy and Reprosecution after mistrials:

> "Is the manifest necessity manifestly necessary?" 69 N.W.U.L.Rev. 887, 912 (1975).

The Double Jeopardy Clause does protect a defendant against Governmental action intended to provoke a mistrial motion and thereby subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad faith conduct by the judge or prosecutor" threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity "to convict the defendant." *United States v. Jorn*, 400 U.S. at 485, 91 S.Ct. 547 at 557, 27 L.Ed.2d at 556; *Downum v. United States*, 372 U.S. at 736, 83 S.Ct. 1033 at 1034, 10 L.Ed.2d at 102. See *Gori v. United States*, 367 U.S. at 369, 81 S.Ct. 1523 at 1526, 6 L.Ed.2d 905; *United States v. Jorn*, 400 U.S. at 489, 91 S.Ct. 547 at 559, 27 L.Ed.2d at 558 (dissenting opinion); Cf. *Wade v. Hunter*, 336 U.S. at 692, 69 S.Ct. 834 at 838, 93 L.Ed. at 979. Thus, reprosecution is barred by double jeopardy where prosecutorial misconduct forces a defendant to move for a mistrial which operates as a "post jeopardy continuance to allow the prosecution an opportunity to strengthen its case." *Illinois v. Sommerville*, 410 U.S. at 469, 93 S.Ct.

at 1073, 35 L.Ed.2d at 434. See also *United States v. Tateo*, 377 U.S. at 467, 468, n.3, 84 S.Ct. at 1589, 1590, 12 L.Ed.2d at 451-452.

In requesting the issuance of the writ, Appellant Gibbs would respectfully ask the Court to address itself to the following question. If the prosecutor had stood up and falsely proclaimed that a person on trial was a "safe burglar", would the Court consider this prosecutorial "overreaching"? Would the situation not be even more aggravated if the prosecutor made the remark not only falsely, but recklessly; that is, without any effort to check the truth of the statement, merely repeating idle gossip from a known criminal?

The issue before the Court tends to be obscured by the fact that a witness made the remark. Appellant feels that because of the special nature of the witness that an express agency existed between Officer Biello and the prosecutor at the time the damage was done.

Biello was an experienced law enforcement officer. He was working for the Attorney General as a Special Agent for the United States Drug Enforcement Agency. He had discussed the case thoroughly with the Assistant United States Attorney, who was trying the case. He was the case agent and was directly assisting in the trial by sitting with the prosecutor during the entire case. He had listened to the expert testimony which seemed to be going badly for the Government. When questioned on voir dire, after the mistrial, his answers were equivocal, to put it as mildly as possible.

Appellant Gibbs takes the position that because of the special position of the witness, he was not only an "agent" of the Government, but an integral part of the prosecution team.

The doctrine of respondent superior is as old as the common law. An agent binds his principle as long as certain conditions are met. If the prosecutor argues that they had no knowledge of the statement nor any warning that it would be made, this fact, while true, would be irrelevant.

Would any court seriously consider a statement by an owner of a truck that he [the owner] had warned his driver never to run a red light, that he knew nothing of the driver running the red light, and therefore, was not responsible for his driver's actions in running the light and injuring a third person? Appellant argues that whether the prosecutor knew or not is irrelevant in this instance because of Biello's central role in the prosecution of the Government's case. To distinguish Officer Biello from the prosecutor is a distinction without rational foundation, which must be tossed aside. The Court can examine any volume of either State or Federal reports between 1865 and 1950. Prosecutorial and police misconduct is rare or nonexistent as an issue on appeal. Examine the same reports at random between 1950 and the present. Early on there is a trickle which grows and grows until today we are in the midst of a flood. The reports are filled with the issue. Page after page of the Federal Digest sing the sad song.

As long ago as 1931, former Chief Justice Warren was warning the National District Attorneys Association of this danger. Report of the National District Attorneys Association—1931.

Within a few short weeks, an attorney practicing criminal law perceives the close cooperation between the police and public prosecutor, particularly, as here, where the police officer sits with the Assistant United States Attorney trying the case and as it were, orchestrates the

presentation of the case. Indeed, in order for the Court to allow an exception to the "rule" as to the sequestration of witnesses, the Government must state that the particular person outside the rule is *necessary* in order to prosecute at all. In analyzing agency cases such as this, it seems that most deal with either a witness perjuring himself or withholding information, as well as failure of communication between various members of United States Attorney Offices. *Giglio v. United States*, 405 U.S. 150, 31 L.Ed.2d 104, 92 S.Ct. 763 (1975), is an example. There an assistant failed to pass on certain information about a witness. The Court said at page 504:

> "Moreover, whether the nondisclosure was the result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the government. A promise made by one attorney must be attributed, for these purposes to the government. See Restatement [2d] of Agency Sec. 272. See also American Bar Association Project on Standard Procedure before Trial. Sec.2.1 [d]. To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it."

We are not dealing with the situation as found in *United States v. Stassi*, 544 F.2d 579-587 (2nd Cir. 1976). In *Stassi*, the parole Board's actions in releasing a prisoner, who was immediately deported, thereby depriving the defendant of his testimony, was found grossly negligent by the trial court. Yet the Court would not invoke any agency concept binding the Government by the Board's action even though the Parole Board is a subdivision of the Office of the Attorney General. The Court felt that a department which employed thousands of workers could

not be expected to have implied knowledge of events far removed from their day-to-day business. Again, in *United States v. Quinn*, 445 F.2d 940-44 (2nd Cir. 1974), the Court would not charge that the United States Attorney's Office with knowledge concerning a sealed indictment returned in Florida.

A case in point is *United States v. Morrell*, 524 F.2d 550 (2nd Cir. 1976). There certain information was withheld from the defendant. When the United States Attorney's Office discovered the existence of the evidence, it immediately surrendered it to the Court of Appeals. They themselves were neither negligent nor inadvertent. However, an Agent McElroy, of the Drug Enforcement Agency, worked the case and the informant. McElroy knew everything about the informant including the details of past crimes. He did not volunteer anything. As in our case [Biello dealt with the informants, made the buys and assisted in the trial of the case], McElroy sat at the prosecution table during most of the trial and had worked the informant for some time.

In reversing the conviction, the Court characterized his actions as being "an arm of the prosecutor". *Morrell*, at 555. McElroy's part in the proceedings [like Biello's in ours] were said by the Court to be "intimately involved in the prosecution." See *United States v. Rosner*, 516 F.2d at 278-279, n.4 (2d Cir. 1974); *United States v. Sperling*, 506 F.2d 1327-1333 (2d Cir. 1976).

Appellant argues that this case should be controlled by *Downum v. United States*, 372 U.S. 735, 83 S.Ct. 1038, 10 L.Ed.2d at 101, where the Supreme Court barred the retrial of the defendant whose first trial had ended in the declaration of a mistrial on the prosecution's motion, because a key government witness was missing on the day of the trial. In *Downum*, the Supreme Court accepted the reasoning of the Ninth Circuit in *Cornero v. United*

States, 48 F.2d 69, 71 (9th Cir. 1931), that reprosecution of the defendant was barred by double jeopardy because the prosecutor had chosen to go forward with the swearing of the first jury even though there was insufficient evidence to convict without the testimony of the missing witness. *Downum* has been interpreted by subsequent decisions as a case where the declaration of mistrial was subject to prosecutorial manipulation. See *Illinois v. Sommerville*, 410 U.S. at 469, 93 S.Ct. at 1072, 35 L.Ed.2d at 433. See also *United States v. Tateo*, 377 U.S. at 476, 468 n.3, 84 S.Ct. at 1589-1590, 12 L.Ed.2d at 451-452. Other Courts have expressed a view that prosecutors should not be allowed to manuever a mistrial to cause a delay which allows the prosecution to strengthen its case. See *McNeil v. Hollowell*, 481 F.2d 1145, 1150 (5th Cir. 1973); *United States v. Beasley*, 479 F.2d 1124, 1126-27 (5th Cir. 1973); *United States v. Kessler*, 530 F.2d 1240; and *United States v. Wilson*, 534 F.2d 76 (6th Cir. 1976). It is Appellant's contention that the Agent stood in the prosecutor's place and by maneuvering Appellant into moving for a mistrial by his flagrant misconduct, the Government should have been barred from retrying Appellant.

CONCLUSION

For all of the above reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

GARLAND, NUCKOLLS, KADISH,
COOK & WEISENSEE, P.C.

/s/ EDWARD T. M. GARLAND
EDWARD T. M. GARLAND

/s/ MARK J. KADISH
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Atlanta, Georgia 30303
Phone 404/577-2225

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing Petition upon Assistant United States Attorney, Sam Wilson, Middle District of Georgia, by depositing same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This the 3rd day of November, 1977.

/s/ EDWARD T. M. GARLAND

EDWARD T. M. GARLAND

Appendices

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 77-5163
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN WILLIAM GIBBS,.
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

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(August 17, 1977)

BEFORE AINSWORTH, MORGAN and GEE,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966

APPENDIX B

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK
October 4, 1977

TO ALL PARTIES LISTED BELOW:

NO. 77-5163—U.S.A. v. JOHN WILLIAM GIBBS

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be pooled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, *Clerk*

By /s/ Brenda M. Hauck
Deputy Clerk

**on behalf of appellant, John William Gibbs,

cc: Mr. Mark J. Kadish
Mr. Cliffe Lane Gort
Mr. Samuel A. Wilson, Jr.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA ATHENS DIVISION

[Filed in Deputy Clerk's Office Jan. 13, 1977, at 12:30 P.M., U. S. District Court, Middle District of Georgia]

UNITED STATES OF AMERICA
vs.
JOHN WILLIAM GIBBS
} Criminal No. 76-7 Athens

EVIDENCE GIVEN IN TRIAL BEGINNING JANUARY 12, 1977

LARRY WHEELER

Witness called by the Government first being duly sworn, testified on

DIRECT EXAMINATION

BY MR. WILSON

Q Will you state your name, please?

A Larry Wheeler.

Q And where are you employed, Mr. Wheeler?

A At the State Crime Lab in Atlanta.

Q What are your duties at the State Crime Lab in Atlanta?

A To receive and analyze evidence brought in by police officers.

Q Generally what type of evidence?

A Suspected drugs.

Q Do you have any educational background as far as examination of drugs is concerned?

A I have a B.S. in chemistry from Valdosta State College and an M.S. in chemistry from Georgia Tech. I have been with the crime lab for almost three years.

Q Other than your degree, Bachelors Degree in chemistry and Masters Degree in chemistry, have you attended any schools specifically on examination of controlled substances?

A No sir. When I started at the crime lab I went through a six month period of training in the examination of drugs that we see there.

Q Are you familiar with the examination of substances to determine whether or not the substances contain heroin?

A Yes sir.

Q What kind of tests do you perform on those substances?

A Color tests, ultraviolet spectrophotometer, thin layer chromatographs and gas chromatographs.

Q About how many samples have you examined to determine whether or not any substance contained heroin?

A I wouldn't know the exact number, probably several hundred.

Q Several hundred?

[3]

MR. WILSON: Your Honor, I offer Mr. Wheeler as an expert.

THE COURT: Do you gentlemen wish to cross examine him as to his qualifications?

MR. KADISH: No, Your Honor.

THE COURT: Alright, you may proceed.

Q MR. WILSON: Mr. Wheeler, I hand you a packet labeled Government's Exhibit No. 1 marked for identification. Can you identify that?

A Yes sir, I received this packet in the crime lab on April 27th of this year from Detective Biello.

THE COURT: Last year or this year?

THE WITNESS: Last year, '76. Excuse me.

Q MR. WILSON: Did you examine the contents of that packet and determine the chemical nature of the substance?

A Yes sir, after I received it and entered it into evidence and assigned it this number which I have here, I took it back and examined the contents of both the large plastic bag and the small plastic bag which are in here and found them both to contain heroin.

Q Approximately how much heroin?

A The large plastic bag had 9.47 percent heroin. The smaller bag had 12.2 percent.

Q Did you weigh it?

[4]

A Yes sir. The large bag weighed 29.6 grams and at 9.47 percent that comes out to be 2.8 grams of heroin in the sample. The smaller bag weighed 699 milligrams which comes out to be 85.3 milligrams of heroin in the smaller bag.

THE COURT: What's the weight again on that?

THE WITNESS: The large bag altogether weighed 29.6 grams.

THE COURT: And that computes to 2.8 grams?

THE WITNESS: 2.8 grams of heroin in the sample.

THE COURT: What's the like measurement on the—

THE WITNESS: The other one weighed 699 milligrams which is 85.3 milligrams of heroin in the sample.

Q MR. WILSON: When you use the smaller weight figures are you computing the pure heroin?

A Yes sir. For instance the 29.6 grams is 9.47 percent heroin. That comes out to be 2.8 grams of pure heroin. If it was separated from the remainder of the powder you would get 2.8 grams of heroin out of the bag.

Q But the gross weight I believe you testified was—

A 29.6 grams.

[5]

Q That's the whole brown powdered substance?

A Yes sir.

Q And the small bag was—

A 699 milligrams.

Q About how much would that be in grams?

A That's .699 grams; about seven-tenths of a gram.

Q So the whole sample weighed a little over 30 grams, is that correct?

A Yes sir, a little over 30 grams.

Q When you finished your examination and determined that the substance in Government's Exhibit 1 was heroin, what did you do with the substance?

A I put it back in its bag and sealed it with staples and also with evidence tape, and then I locked it up in my locker.

Q In your locker?

A Yes sir.

Q Did anyone else have access to that?

A No sir.

Q When did you take it out of the locker?

A Well, this morning when I came to court. I left Atlanta and came to court.

Q Who did you give it to?

A Gave it to you in your office.

Q Who did you say brought you the heroin?

[6]

A Detective Biello.

Q I show you a packet marked Government's Exhibit No. 2 and ask if you can identify that please?

A Yes sir, I received this from Detective Biello also on April 27th of 1976. It contains two plastic bags which contain brown powder.

Q And did you perform a test to determine whether or not the substance contained in those two bags was—

A Yes sir, I did the same tests on these bags that I did on the other bags.

Q And what were your conclusions?

A That these two bags also contained heroin.

Q And what was the gross weight of the brown powder substance in Exhibit 2?

A Let's see. I only weighed, I believe —— I only weighed one bag. One bag weighed 24.9 grams. They are approximately the same size.

Q 24.9 grams?

A 24.9 grams.

Q Per bag?

A Per bag, yes sir. The percentage was 9.73 percent or 2.42 grams of heroin per bag.

Q And there are two bags?

A Yes sir.

Q After you determined that the substance contained [7] in those two bags was heroin, what did you do with those?

A I resealed it with staples and evidence tape and locked it back up and it was with the other bag I got out of my locker this morning and gave to you this morning in your office.

Q Did anyone else have access to that sample other than yourself?

A No sir.

MR. WILSON: Your Honor, at this time we offer Government's Exhibit No. 1 and 2.

THE COURT: Alright. Any objection, gentlemen?

MR. KADISH: No objection, Your Honor.

THE COURT: Alright, admitted.

MR. WILSON: We have no further questions of this witness.

THE COURT: He is available for cross examination.

CROSS EXAMINATION

BY MR. KADISH:

Q Mr. Wheeler, I'm Mark Kadish, and I represent John William Gibbs. You were asked a question by Mr. Wilson a short while ago and you opened something up in front of you there to look at something, a little folder.

A Yes sir.

[8]

Q What was that that you opened up?

A This is my case folder which has in it my copy or the original of the report which was sent to Detective

Biello to be turned in to the U. S. Attorney which tells me who brought the evidence and tells me when it was brought to me.

MR. KADISH: Your Honor, may I see those?

THE COURT: Certainly.

Q MR. KADISH: Mr. Wheeler, were there two different exhibits that you have talked about—do you have a second folder for the second exhibit?

A Yes sir, this one here.

Q Mr. Wheeler, I would like to show you these copies of two documents. As you look at those, Mr. Wheeler, do they appear to be exact copies of your official report of April 29, 1976, relating to Case No. 76-9107 which I believe is Exhibit 2 today and which I believe relates to Exhibit 2?

A 9107 I believe is Exhibit 1.

Q Okay, Exhibit 1. And then 76-9108 also dated April 29th which relates to Exhibit 2?

A Yes sir.

Q They are copies of your report?

A Yes sir, they appear to be.

MR. KADISH: Your Honor, I introduced those [9] and asked him to look at those copies rather than mark the original documents of his and I would like to ask the court reporter to mark these two documents as Defense exhibits.

THE COURT: Yes sir.

Q MR. KADISH: I will hand you what has been marked Defendant's Exhibit 1 and Defendant's Exhibit 2 for identification. Mr. Wheeler, were those two documents which you have marked as Defendants Exhibit 1 and Defendant's Exhibit 2 prepared by you?

A The report was typed up by a secretary. I checked it over and signed it.

Q So this report was prepared at your direction?

A Yes sir.

Q And after the secretary typed it, you carefully reviewed it?

A Yes sir.

Q Down at the bottom of the page is a little slash where it says TM/LWW then slash P. I take it the "P" is the secretary who typed it?

A Yes sir.

Q And I take it the TM stands for Terry Mills?

A Yes sir, that's correct.

Q And I take it that the LWW stands for Larry W. Wheeler?

[10]

A Yes sir.

Q Where did you get the information that is contained on these two exhibits that you have in front of you?

A You mean from the top where it says city, county, suspect, officers, all that?

Q Yes sir.

A That was supplied by Detective Biello when he brought in the evidence.

Q Did you have a conversation with Detective Biello when he brought the evidence in?

A No sir, I don't believe I had any conversation with him. I don't remember whether I did or not but I don't believe I did. This information is always gotten when

evidence is brought in—the name of the suspect, the county where the case is made, the name of the officers on the case.

Q By conversation, however brief it was, you did speak to Agent Biello briefly to get this information?

A Yes sir.

Q Did you know Detective Biello prior to this meeting with him on April 29th? Had you met him before?

A I had met him. I don't remember whether this was the first time or not.

Q It may have been the first time that you met him?

[11]

A It could have been.

Q You personally received Exhibits 1 and 2 from him?

A Yes sir, I did.

Q I call your attention to the block on your report—these are official reports are they not?

A Yes sir.

Q They become a part of the official records of the Georgia Bureau of Investigation, Crime Laboratory?

A Yes sir.

Q I call your attention to the block where it says suspect on that report. Would you be so kind as to tell His Honor and the jury whose name appears in that block?

A Thomas Bryant.

Q Does his name appear as a suspect on both of the official reports, Exhibits 1 and 2?

A Yes sir.

Q Does the name John William Gibbs appear as a suspect on your official report?

A No sir.

Q Now with regard to the date, you said you received it on April 27, 1976, did you not?

A Yes sir.

Q Do you know what day of the week that was?

A No sir, I sure don't.

[12]

Q Do you have a calendar on your person that might help us establish that date?

A I don't know if I took my '76 calendar out or not. I think I have one. April of 76—April 27th was on a Tuesday.

Q Tuesday?

A Yes sir.

Q Do you recall the date that Agent Biello said that he obtained this heroin from Mr. Bryant? Do you remember that date?

A No sir, we—

THE COURT: Wait just a minute now. There has been no testimony he said he obtained it from Mr. Bryant.

MR. KADISH: Let me rephrase it. I think the Court is correct. I will rephrase the question.

Q MR. KADISH: Do you recall if Agent Biello told you the date that he came into possession of the heroin, that is that Agent Biello came into possession of it?

A No sir.

Q Is your laboratory open on Friday during the week?

A Yes sir.

Q Is it open on Saturday?

A It's open but there's not necessarily—it's open in case someone wants to work or in case of an emergency, [13] but there's not as a matter of policy always someone there to receive evidence.

Q Is it open on Sunday?

A Generally not.

A If an agent comes into possession of heroin, if he calls the laboratory on Saturday or Sunday in order to place it into the possession of an analyst, can he get somebody there to receive it?

A If it was an emergency, yes sir.

Q When you received Exhibits 1 and 2 from Agent Biello did they come in that large plastic folder that surrounds the little ones?

A Yes sir, they did.

Q When Agent Biello brought them to you it was just like this in this bag?

A Yes sir.

Q And you opened it and did your work and put it back?

A Yes sir.

MR. KADISH: No further questions.

THE COURT: Anything else for the Government?

MR. WILSON: Nothing further for the Government.

(Witness excused)

RONALD A. HANEY

Witness called by the Government
first being duly sworn, testified on

DIRECT EXAMINATION

BY MR. WILSON:

Q State your name please?

A Ronald A. Haney.

Q Spell your last name please?

A H-a-n-e-y.

Q Where are you employed, Mr. Haney?

A The State of Georgia Crime Laboratory in Atlanta.

Q What are your duties there?

A I am a forensic chemist at the lab.

Q What does a forensic chemist do?

A Analyze any illegal or illicit drug sample that's brought into the laboratory by any law enforcement agent.

Q Do you have any special training in chemistry or forensic chemistry?

MR. KADISH: Your Honor, we will be happy to stipulate to Mr. Haney's expertise.

THE COURT: Well, it might be appropriate since the jurors don't know, of course, to judge his credibility to let him briefly outline his qualifications and experience.

[15]

Q MR. WILSON: Will you briefly outline your training and experience in this field?

A Yes sir. I received a Bachelor of Science degree in chemistry from Ohio University in 1970. I received a

Master of Science degree from the University of Georgia in analytical chemistry in 1975, and I was employed at the lab in October of 1974 and went through a six month extensive training program which covered all areas and aspects of drug analysis.

Q Have you examined substances to determine whether or not they contained heroin?

A That's correct.

Q About how many samples have you examined?

A Approximately 150.

Q What type tests are run on those samples?

A Basically the tests are instrumental. The first one you use is an ultraviolet spectrophotometer test. The second one would be a gas chromatography test, and the third one is more of a wet chemistry method, it is a thin layer chromatography test.

MR. WILSON: I offer Mr. Haney as an expert.

THE COURT: It's been agreed that he is.

Q MR. WILSON: Mr. Haney, I show you a packet marked Government's Exhibit No. 3. Can you identify that packet?

[16]

A Yes I can. It has my initials on the back.

Q When did you receive that packet?

A I received this on May 17, 1976.

Q From whom did you receive that packet?

A From J. J. Biello.

Q You were at the crime lab?

A That's correct.

Q Did you perform any tests on the substance marked

Government's Exhibit No. 3 to determine whether or not there was heroin present?

A Yes I did.

Q What was your conclusion?

A My conclusion was the substance in Government's Exhibit No. 3 is positive for heroin.

Q Did you weigh the substance to determine what gross weight the brown powder substance was?

A Yes, the weight on the total substance in Government's Exhibit 3 was 50.2 grams.

Q What percentage heroin did you determine was contained in that brown powder substance?

A The percentage was eleven and a half percent.

Q After you examined the substance and determined it contained heroin, what did you do with that packet?

A After I examined the plastic bags that was inside I placed it back in the larger plastic bag, sealed it with [17] red evidence tape and stapled it and placed it in my personal evidence drawer.

Q Did anyone else have access to that packet?

A No they did not.

Q When did you remove it?

A I removed it this morning from my evidence locker and brought it to court.

Q Who did you give it to?

A I gave it to you.

MR. WILSON: We move the admission of Government's Exhibit 3.

THE COURT: Any objection?

MR. KADISH: No sir.

THE COURT: It's admitted. He's available for cross examination.

MR. KADISH: Your Honor, I neglected to move Defendant's Exhibits 1 and 2 into evidence at the close of Mr. Wheeler's examination. May I do so?

THE COURT: Any objection to the reports?

MR. WILSON: No sir.

THE COURT: Admitted.

CROSS EXAMINATION

BY MR. KADISH:

Q Did you have a little folder that you were just reading from to give your report? May I see it please?

[18]

A Yes sir.

Q Mr. Haney, this document known as an official report—let me ask the clerk to mark this as Defendant's Exhibit 3—Exhibit 3, Mr. Haney, does it appear to be an exact copy of your official report made on Case No. 76-10651 dated May 20, 1976?

A Yes sir it is.

Q And was this official report prepared at your direction?

A Yes it was.

Q Typed by some secretary in your offices?

A That's correct.

Q This document is an official document of the Georgia Bureau of Investigation, is it not?

A Right.

Q In May of 1976, more particularly during this

week of May 20th, is the Georgia Crime Laboratory open for business during that week on Monday, Tuesday, Wednesday, Thursday and Friday for regular business during that week?

A Yes sir, it is.

Q And is it open on Saturday and Sunday if need be to conduct examination of heroin seized by agents?

A That is correct.

Q You said that you received this packet of heroin directly from Agent Biello, did you not?

[19]

A That's right.

Q When you received it from him did he give you the information that permitted you to dictate or write up this official report that you have before you in connection with Exhibit 3?

A You mean as far as who the suspect was?

Q Yes.

A Yes, that's right.

Q So you did have a brief conversation with him on that day?

A Right.

Q And did he tell you on that day—you can tell from looking at the block marked "suspect" that the suspect in this case was Thomas Bryant?

A Yes, right.

Q Now did he also tell you on that day that he had seized this heroin or obtained this heroin on May 12, 1976?

A I don't recall that he brought that to my attention, when he seized it.

MR. KADISH: Your Honor, I wonder if I could ask the Court at this point to take judicial notice of the fact that May 12, 19—

THE COURT: Well, there has been no proof that anything happened on May 12th, gentlemen.

[20]

MR. KADISH: Well, it's subject to connection but I believe—

THE COURT: Well, when it comes out we will—

MR. KADISH: Well, can we take judicial notice that May 17th was a Monday?

THE COURT: If that's what the calendar shows. I am not looking at a calendar.

MR. KADISH: Well, I have a '76 calendar.

THE COURT: Alright, I will assume that your calendar is accurate.

MR. KADISH: May I just see this exhibit for a moment?

THE COURT: Certainly.

MR. KADISH: I would like to move into evidence this —

THE COURT: Any objection to the report?

MR. WILSON: No sir.

THE COURT: It's admitted.

MR. KADISH: Your Honor, may I show these to the jury at this time?

THE COURT: Yes sir.

MR. KADISH: I would like to circulate them.

THE COURT: Let them see them all. Hand them all the exhibits.

[21]

(Exhibits are passed to jury)

Q MR. KADISH: Mr. Haney, I would like you to look at Government's Exhibit 3 if you will. Those are the packets that you tested, correct?

A That is correct.

Q Would you look at on the front of that there is a little ticket, so to speak?

A Yes sir.

Q Is there a date on there when it says that heroin was obtained?

A Yes, it says date of seizure, May 12, 1976.

Q And you received this on what date?

A On the 17th.

Q Is there a notation there that says date opened by lab?

A Yes there is.

Q And with respect to where it says date opened by lab, what date is there?

A There is no date.

Q Can you explain why there is no date where it says—

THE COURT: What does that have to do with this case?

MR. KADISH: Well, I think we have a right to inquire, Your Honor, just what happened when this [22] was received by him and ask why—

THE COURT: Do you want to ask him when he did open it? Your question presupposes there is some duty on his part to fill in that blank. Do you want to ask him when he did open it?

MR. KADISH: No, I wanted to ask him if he in his normal course of business fills that in and if he is

required to do so under the regulations of the Georgia Crime Laboratory.

THE COURT: Alright, go ahead.

Q MR. KADISH: Mr. Haney, is it in the normal course of your business when you receive one of these envelopes from an agent, do you usually fill that date in, the date opened?

A No, we do not.

Q You are not required to do so by your regulations?

A No.

MR. KADISH: Your Honor, may I now ask the Court to take judicial notice of what day of the week May 12th was?

THE COURT: Yes sir, what day was it?

MR. KADISH: Wednesday.

THE COURT: Alright. Any other questions?

MR. KADISH: Nothing further of this witness.

THE COURT: Any further questions?

[23]

REDIRECT EXAMINATION

BY MR. WILSON:

Q Defendant's Exhibit No. 3, who is listed there as a suspect?

A The suspect was Thomas Bryant, and then a comma, et al.

Q Et al?

A Correct.

Q What does that mean?

A It means apparently in this case there were other suspects involved.

MR. WILSON: No further questions.

THE COURT: Anything else?

MR. KADISH: No further questions.

THE COURT: You may go down; you may be excused.

J. J. BIELLO

Witness called by the Government,
first being duly sworn, testified on

DIRECT EXAMINATION

BY MR. WILSON:

Q Would you state your name please?

A J. J. Biello.

Q Where are you employed, Mr. Biello?

A City of Atlanta Police Department, Narcotics Division, and I am temporarily assigned to the Federal [24] Narcotics, which is Drug Enforcement Administration Task Force.

Q And you are stationed where?

A In Atlanta, Georgia.

Q Are you acquainted with Mr. John William Gibbs?

A Yes sir, I am.

Q Is he present in the courtroom?

A Yes sir, he is.

Q Where is he?

A He is seated right now at defense table. He has the beige suit on.

Q Who introduced you to Mr. Gibbs?

A James Thomas Bryant.

Q Where did James Thomas Bryant reside at that particular time?

A He was living at the Netherland Apartments which is located at 347 Pat Mell Road, Marietta, Cobb County, Georgia.

Q Prior to your making the acquaintance of Mr. Gibbs through Mr. Bryant, how long had you known Mr. Bryant?

A Not very long; approximately less than a month.

Q And who introduced you to Mr. Bryant?

A An informer of mine.

Q Would you describe briefly the transactions immediately preceding your acquaintance with Mr. Gibbs? [25] In other words, how did it come up that you were going to be introduced to Mr. Gibbs?

A I was at the Day's Inn located on U. S. 441 and I-20 at Madison, Morgan County, Georgia.

Q Wait just a minute. Back up. How did you get from Atlanta to Madison—what was the occasion for that?

A James Thomas Bryant whom I had met previous to the 22nd of April gave me his phone number and discussed me meeting his man, which he quoted, named Billy in Madison. Billy came from Augusta. Billy didn't want to come all the way to Atlanta to meet me so Mr. Bryant established a half way point and that was Madison, Morgan County.

Q You referred to Mr. Bryant telling you that Gibbs was his man?

A His main man from Augusta, Billy. He said his name was Billy. He didn't say Gibbs. He said Billy.

Q Can you define the term main man for us?

A Well, in the drug culture—

MR. KADISH: I object, Your Honor.

THE COURT: I don't believe he can tell us what he thinks main man means. Go ahead.

Q MR. WILSON: Will you tell us what you think main man—

THE COURT: No sir, I don't think he can do that now. Go ahead.

[26]

Q MR. WILSON: Did Mr. Bryant tell you what the term "main man" meant?

A No he didn't go into any details.

Q Had you had any business transactions with Mr. Bryant prior to meeting Mr. Gibbs?

A Yes sir I did.

Q And I believe we left off when you were talking about Mr. Bryant saying Gibbs was his main man. Will you continue?

THE COURT: Instead of just saying continue, ask him a question now Mr. District Attorney so we'll know where we're going.

Q MR. WILSON: Did you meet Mr. Bryant for the purpose of traveling with him to some location for the purpose of meeting his main man?

A Yes sir, I did.

Q When did he tell you who his main man was?

A Well, when we were traveling on I-20 eastbound towards Madison, Mr. Bryant was telling me all about himself and Billy, how they went back ten years ago. They were partners and that they were safe burglars—

THE COURT: Whoa just a minute.

MR. KADISH: Your Honor, I object. I ask to approach the bench.

THE COURT: You may disregard that reference. [27] It has nothing to do with the case.

(BENCH CONFERENCE. MOTION FOR MISTRIAL MADE AND GRANTED)

* * * *

CERTIFICATE OF REPORTER

I, Merry Ann Finch, U.S. Court Reporter, certify that acting in such capacity I reported the trial which began in the before-stated case, and the preceding pages numbered 1 through this page 27 are a true and accurate transcript of the evidence given from the stand.

WITNESS my hand, this 13th day of January, 1977.

/s/ MARY ANN FINCH

APPENDIX D

[Filed 9:30 A.M., Jan. 17, 1977, Pearl Daniell, Deputy Clerk]

The Following transcript begins at the point where a motion for mistrial was granted by the Court and the jury was dismissed.

MR. KADISH: I do have a motion I wish to submit to the Court, I will do it in writing, a motion to dismiss on the basis of—

THE COURT: You may do so now. State your motion.

MR. KADISH: I have never been with Agent Biello before—I do have some knowledge he has been an agent for three or four years. It seems to me this case falls within the parameters of *United States vs. Dennis* which was decided by the Fifth Circuit last year. It was a very close opinion—8-7, dealing with situation where counsel for the defendant were compelled to move for a mistrial because of—I don't want to use the word misconduct in the sense that Agent Biello intentionally did this. I don't know why it came out the way it did. But it seems to me that the case—and I will ask Your Honor to read the case—it's the closest one to this—in a case where the prosecutor has a witness on the stand and action is taken, or words are spoken in this case, which must require the Court to grant a mistrial, and even where a [2] defendant himself moves for it, I believe this is an appropriate situation for the Court to find that jeopardy has attached. I will ask the Court to permit me, as soon as I can return to Atlanta, to re-read that case and send the Court my thoughts on that in a letter brief—

THE COURT: Sure, you may do that.

MR. KADISH: And ask if the Court will perhaps reserve ruling on it.

THE COURT: I believe I have read most of

those cases and I don't believe that this is that type situation.

MR. KADISH: Where there's a direct showing of prosecutorial misconduct. I would ask for an opportunity to voir dire Agent Biello on the reasons for making that statement, to make it part of the record of this case.

THE COURT: You may do so.

AGENT J. J. BIELLO takes the Stand

CROSS EXAMINATION

BY MR. KADISH:

Q Agent Biello, how long have you been a narcotics agent?

A Less than three years.

Q How many times have you testified in Court?

A Concerning sale cases?

Q How many times have you appeared as a witness [3] in Court as a police officer?

A Several times.

Q Seven?

A Several.

Q Over ten?

A Yes sir.

Q Prior to this case had you had an opportunity to review the rap sheet that was referred to of Mr. Gibbs?

A Review his rap sheet?

Q Yes, his prior criminal record.

A No, I really wouldn't say I had a chance to review

it. I knew that one was being—you know, he had one, but I wouldn't say I sat down and looked at it. No sir. I have never actually looked at his rap sheet.

Q Did you ever, after you had the conversation with Mr. Bryant in the car coming down from Atlanta on the day that you related that conversation, on that specific date in April, after Bryant said that to you did you ever make an effort to ascertain by looking at the rap sheet of Mr. Gibbs' prior criminal record, whether, in fact, Mr. Gibbs had been convicted of any safe burglary?

A No sir, because I really wasn't sure of his name until—when that was said to me, I think until the next day, and I believe I went to the Atlanta ID section and there was nothing on him, no record at all.

[4]

Q So when you checked the Atlanta ID you found no record on Gibbs?

A Yes sir.

Q You did not find anything to show you at anytime since that conversation with Bryant up until the moment that you spoke the words from the witness stand that Mr. Gibbs had a record for safe burglaring, did you?

A No sir, I never proceeded.

Q You never what?

A I never proceeded to see if he did have a record for safe burglary.

Q Are you acquainted with the legal rule, the general legal rule, which states that in a case such as this, well in any case, that it is generally improper to bring out a man's prior record or prior dealings unless you are trying to establish some prior plan, motive or scheme? Have you ever heard that discussed by lawyers in your presence?

A I honestly couldn't give you an opinion on that right now, or an answer.

Q Are you aware of the general legal concept, sir, that when a case is on trial and the District Attorney wishes to bring up a prior record of the accused he can only do so if in the fact there has been a conviction and if he has certified records of those convictions? Do [5] you know about that?

A I really couldn't give you an answer again. I really don't know.

Q In your training learning to become a police officer, or in your training in general, did you go to a police academy?

A Yes sir.

Q Did you go to college?

A Yes sir.

Q You haven't any formal legal education, have you?

A No sir.

Q Did you complete four years of college?

A No sir.

Q In the course of your education, whether it be college or police academy, did you take courses on the law?

A No sir.

Q None at all?

A The only extra course I have had besides recruit school is a two-day search and seizure school.

Q When you have had, in all these prior court appearances you have made in drug cases, have you been cautioned ever by a prosecutor—ever, by any prosecutor at any time, that when you testify you are not to blurt

out any prior acts of misconduct which were rumored to you by [6] an informant, by a co-defendant, or that you might have had some knowledge? Have you ever been cautioned that?

A I don't understand the question.

Q The question is in all of your prior testimony as a police officer, on behalf of either the State Government or the United States of America, has a prosecutor, or an Assistant United States Attorney, or a District Attorney, ever said to you, "Biello, when you testify today, don't blurt out the fact that Mr. X told you the man is a safe burglar, or that he has a prior arrest record for indecent exposure," or something like that, because you knew it was in the man's past and the DA was afraid it might cause a mistrial if you said it?

A That would be hard to answer on the fact that some—you know, all I've told, or all I feel that I can tell is the facts that went to the case. I don't ever remember blaring out anything, for instance, where I said the man had a record for such and such except if it was told to me, and I can remember several times in City Court in Atlanta where I was asked if the man had a record or I have stated that the man had a record and have never been reprimanded for it.

Q Prior to your testimony today, did you have any discussions with Mr. Wilson, the Assistant United States Attorney prosecuting this case, about your testimony? To [7] review it?

A Yes sir.

Q When you reviewed your testimony with him, did you tell Mr. Wilson that Thomas Bryant on the way down from Atlanta had told you that he was partners

with Billy Gibbs in safe burglaries? Did you tell this to Mr. Wilson?

A I distinctly tried to go into as much detail as I could about the case.

Q Mr. Biello, the question can be answered "yes" or "no".

A I don't remember.

Q You don't remember?

A I don't remember.

Q When you wrote your report of this particular transaction, which report on the first page describes the trip from Atlanta down there to Madison, did you write down on that report—

THE COURT: Of course that report doesn't include—you can file it with the court reporter. That does not include that conversation. I have read the report.

MR. KADISH: Yes sir, but if I could ask him in the record—

Q Mr. Kadish: Did you write down in your report about this statement that Bryant had made to you [8] about the safe burglary business. Did you write it in your report?

A No sir.

Q Was there a reason why you didn't write it in your report?

A Yes sir, there were several facts that stuck in my mind which I was positive I could recall that was said, and I jotted—just write enough on the report that it will recall my memory to certain things.

Q When was the last time you reviewed that report?

A This morning.

Q When?

A This morning, sir.

Q And you did have discussions earlier this week in detail with Mr. Wilson about this case, did you not?

A Yes sir.

Q About how long did you speak with Mr. Wilson about this case earlier this week?

A Off and on—Monday and Tuesday of this week off and on. A couple of hours, maybe, off and on, not just a straight our or something of that nature.

THE COURT: Let's cut through this just one minute. Mr. Wilson, did the witness apprise you of that conversation?

MR. WILSON: Yes sir. Did he surprise me?

[9]

THE COURT: No, did he apprise you of the conversation that he told the jury of during any of your interviews with him?

MR. WILSON: Not specifically as to—

THE COURT: The word "safe burglaries."

MR. WILSON: No, Your Honor.

THE COURT: You had not heard that before today?

MR. WILSON: No, Your Honor. Now I heard that Mr. Gibbs was a safe burglar, but not from Biello. It was from the people over there in Augusta.

THE COURT: You had not heard it from this witness?

MR. WILSON: No sir.

MR. KADISH: I have one that I was curious about as a result of the Court's asking Mr. Wilson some

questions, I would ask through the Court to ask Mr. Wilson whether or not Biello related to him that Gibbs and Bryant were involved in any type of criminal activity. That is, was Mr. Wilson alerted to the fact that Biello had knowledge of unrelated prior misconduct which Agent Biello might blurt out, whether intentionally or otherwise?

THE COURT: We are not going into any other areas now.

[10]

MR. KADISH: Well, for example, Your Honor, if he said that—Biello said to Mr. Wilson that Gibbs and Bryant told him he and Gibbs were burglars, loft burglars, or some other type burglars, and Mr. Wilson said to Mr. Biello, "I caution you, please don't say that about any prior misconduct," I think that would be very relevant to these proceedings if the officer then said it. That's all I want to know. In other words, if Mr. Wilson gave him any type of cautionary—

THE COURT: Well, ask the witness that.

Q Mr. Kadish: Did Mr. Wilson give you any cautionary instructions about relating any prior misconduct of Gibbs as related to you by Bryant or anyone?

A No sir.

Q Why would you say that? Why would you use the words "safe burglars"?

A I was trying to go over detail that I could recall in my memory pertaining to this case from the time I picked up Mr. Bryant on the 22nd of April until the time I left Mr. Gibbs' presence.

Q What conceivable relationship to this case could the fact, if it is a fact, that Bryant and Gibbs were partners in safe burglaries years before—what conceivable effect or relationship or materiality could that fact have to [11] matters before this jury?

THE COURT: That would be for this Court to decide.

MR. KADISH: I want to go into his state of mind.

THE COURT: That's not his state of mind. The witness was asked a general question about what happened next. Now if in truth and fact that was said, then it was said, and it would be then for the Court to decide what materiality it would have. As an illustration, if you do proceed to raise a defense of entrapment it may well be relevant that prior to this occasion these men had been associated with each other.

MR. KADISH: Associates. That's right.

THE COURT: Yes sir, in a criminal enterprise. Predisposition to commit crime raises that issue, you know. So this statement is not beyond the possibility of being material to this case later on in the case.

MR. KADISH: The Court would agree that if the statement becomes relevant, if it does—and I'm not sure I agree with what the Court says—but if it does by virtue of the defense—and further, a defense of entrapment is raised, it only becomes relevant in rebuttal.

[12]

THE COURT: That's right. In other words, if Mr. Bryant takes the stand and he is there to support your defense of entrapment, he could be asked about his prior association with this—

MR. KADISH: Yes. I agree that that probably would be relevant.

THE COURT: And this man in rebuttal could come in and be called upon to say "What was your conversation about your prior association?" Right?

MR. BROOKS: Only if Bryant denies it.

THE COURT: Oh yes sir. But I mean down the road it can become relevant. You gentlemen, of course, have put everybody on notice about entrapment.

MR. KADISH: What's that?

THE COURT: I say you have put everybody on notice about entrapment.

MR. KADISH: We have made no effort to conceal that.

THE COURT: So this was not such a way-out conversation in the Court's mind.

MR. KADISH: It is way out in the sense that I did not feel—I don't believe anybody in this courtroom would feel that it was responsive to the District Attorney's question because he said he was surprised, and so if he was surprised, he was surprised.

[13]

THE COURT: The record will have to speak for itself on that.

MR. KADISH: Yes, it will. Anyway, I don't have any further questions of Agent Biello. I would ask the Court to reserve ruling on this matter until such time as I can furnish the Court with a very brief letter brief on the subject.

THE COURT: Oh yes sir. In the meantime you may assume, though, that this case will be tried next Monday morning at 9:30.

MR. KADISH: Your Honor, I would also ask that the Court take whatever steps that can be taken to prevent this agent or other agents from blurting out any conversations of this general type until such time as the Court would rule that it is relevant.

THE COURT: Oh yes sir. In fact I was just about to tend to that, when you get through. Don't worry about that. Mr. District Attorney,—

(Mr. Brooks speaks to the Court about his schedule—discussion is not transcribed as part of the record.)

THE COURT: We will resume then at 9:30. One other thing—Mr. District Attorney, if you have not

personally interviewed every witness about his entire testimony, you are directed to do so before Monday morning. You are further directed to not put [14] any witness on this stand that you yourself—I don't mean through somebody else now—in person, have not interviewed entirely on everything that happened, everything that was said. You are further directed, to review the law of conspiracy as to the beginning and ending points of conversations that may be quoted. You have a defendant who is on trial. It's alleged that he was a participant in a conspiracy. Now that doesn't mean that in the beginning at the year One that what everybody said about him can come in.

MR. WILSON: Yes sir.

THE COURT: You must establish that a conspiracy has begun and that he is a member before any conversations are admissible. You started out on the wrong track about that.

MR. WILSON: Yes, Your Honor, but I believe that the case law says that if it is, in fact, established in the same chain of events, merely to show that one conspirator introduced to another, and then prove the conspiracy—you can't use the statement to prove the conspiracy, but whether or not the conspiracy comes first—

THE COURT: The chicken or the egg. I understand that. But when you start out not only saying how did you meet him, but what did the co-conspirator [15]tell you about the man before you ever met him—

MR. WILSON: Yes sir. Well, Your Honor—

THE COURT: That's another question, isn't it?

MR. WILSON: I have introduced—

THE COURT: In other words let me ask you specifically, as a matter of law, how can this man say that the defendant who is not on trial told him that his main man from Augusta was the man that he was going to introduce him to before they met?

MR. WILSON: Well, Your Honor, that's in furtherance—the Government would contend that that was in furtherance of the conspiracy. Later on the transaction as to one defendant selling drugs to another and giving the money to one defendant and that other defendant handing money to the other, we think sufficiently satisfies the conspiracy, and we alleged that the conspiracy did exist prior to that time.

THE COURT: Suppose that the defendant, Bryant, said, that Gibbs and I had been selling drugs together for ten years, and he is my main man from Augusta, and I am going to take you and introduce him to you over at Madison. Do you think that's admissible?

[16]

MR. WILSON: Yes, Your Honor, I do.

THE COURT: How is that admissible?

MR. WILSON: It's admissible as to the—Mr. Biello at that time was a potential customer of this conspiracy. In the drug culture most of the time they are very suspicious, and it would be gaining the confidence of a customer to deal with this other fellow.

THE COURT: That's not admissible, Mr. Wilson. You go up and read your law about conspiracy. That is purely not admissible. The statement of one conspirator before you establish the existence of a conspiracy, that they have been in business together for ten years? How can that be part of a conspiracy or in furtherance of it?

MR. WILSON: Well, he is taking this man here to meet this other man.

THE COURT: So he is. But the point is his statement that they have been in business together for ten years—how is that admissible? That man is not on trial now.

MR. WILSON: No, he is not. However, it's in

furtherance of the conspiracy to entice him to deal with this—

THE COURT: There is no conspiracy to entice [17]this man—that's not the conspiracy. The charge is a conspiracy to deal in drugs.

MR. WILSON: That's correct. But to entice the witness to deal with the conspiracy.

THE COURT: They are not charged with enticing the witness.

MR. WILSON: No, Your Honor. They are charged with conspiracy, and if the statement, if it would be admissible, it would have to be in furtherance of the conspiracy.

THE COURT: How could it be in furtherance?

MR. WILSON: It's in furtherance of the conspiracy because they are charged with a conspiracy to sell heroin and possess it with intent to distribute it. Now this man was a customer, and just assuming it was a business enterprise, say you own a store, and you have a traveling salesman that goes out and says go deal with that store—I've been dealing with them for ten years. I contend that that would be in furtherance of the enterprise in that location.

THE COURT: I invite you, sir, to go up and study the rules of evidence and the law of conspiracy. On Monday you are going to have to be prepared on anything that any witness quotes to establish that as a matter of law that it can come into this Court.

[18]

MR. WILSON: Yes, Your Honor.

THE COURT: And I suggest to you that you had better re-examine your thinking about that.

MR. WILSON: Very well.

THE COURT: You've got to be able, independently of that conversation, to establish that a con-

spiracy was in existence on the date in question. You cannot establish the existence of a conspiracy by the conversation of a co-defendant.

MR. WILSON: That wasn't what we were attempting to do.

THE COURT: Well, that's what you are doing.

MR. WILSON: Your Honor, we are saying that the conspiracy existed—

THE COURT: How are you going to establish its existence?

MR. WILSON: We are going to establish it by the transactions which occurred in the presence of both of them and which occurred later, that same day, a matter of about an hour later.

THE COURT: All right. But that doesn't mean that it existed before that day. Now if the defendant —I know, but it does show that, Mr. Wilson. Now if they are riding down the highway before they ever do business together, and the defendant who is not [19] on trial is talking about his past associations with the man who is on trial, that's the past—that's not today, is it?

MR. WILSON: Yes sir.

THE COURT: Certainly if admitted for the jury, that does prove past association.

MR. WILSON: Yes sir, it does.

THE COURT: Certainly it does. Your conspiracy has never been proved to be established independent of that conversation, so you can't get it in.

MR. WILSON: But the conspiracy would be established with subsequent questions.

THE COURT: Subsequent—but not questions of that witness—I mean of the other defendant. If conversations of the defendant who is on trial—if he says

they have been in business for a long period of time—now that's admissible, because he said it.

MR. WILSON: But see, it's as if you had a store selling cups, say you had a partnership selling cups—

THE COURT: This is not a credit case.

MR. WILSON: If you had a store selling cups there, and you were trying to entice someone to [20] deal with your store—

THE COURT: This is not a cup case. This is a conspiracy case.

MR. WILSON: I'm talking about a product—If you had somebody making cups, and somebody else was a salesman, and somebody else said, "I've been dealing with this cup dealer for ten years. ."—we are not offering that statement to prove the conspiracy but we say that that particular statement is in furtherance of the conspiracy because he is a potential customer, whether it be for heroin or whether it be for cups, and it gains the confidence of this particular person—

THE COURT: But that's not the point. You've got to prove that they did sell cups for ten years. You've got to prove in this case that they were already selling heroin for that to be admissible. And it's got to be proved by something other than a conversation. Now if you can't establish prior transactions, then that just can't come in.

MR. WILSON: I see your point, but we are not trying to prove a ten-year conspiracy. We will prove that the conspiracy existed prior to this particular statement.

THE COURT: By other than conversation?

[21]

MR. WILSON: By other conversations with Bryant.

THE COURT: Then you will have to do it.

MR. WILSON: Yes sir. We weren't trying to slip it in under the door.

THE COURT: I didn't say you were trying to slip it in. I'm just trying to analyze it for you because the Court is going to hold the reins on you real tight.

Now secondly, where you have witnesses who are expected to tell of conversations, I suggest to you after you have interviewed them you will know what conversations you think are admissible and what are not, that there is then a duty on your part to partially lead that witness so that he will not blurt out inadmissible conversations. And that's the usual procedure in a conspiracy case. No witness comes into Court knowing the law. We don't expect them to know the law.

Did y'all hear that now?

MR. BROOKS: Yes sir. I think that on those conversations, Your Honor, that those conversations fall under Jencks and we should be apprised of them.

THE COURT: If there is a statement they fall under the Jencks Act. But they don't have to sit [22] down there and write you a statement.

MR. BROOKS: But if the information comes to the District Attorney and he knows that that will come forth, despite the fact it's not a written statement, it's our position that it comes under Jencks anyway.

THE COURT: Of course Jencks doesn't apply until after the witness testifies. The Jencks Act cases don't provide that matters omitted from reports have to be supplied. At least they haven't to my best knowledge.

All right, we will resume then at 9:30 Monday morning.

RECESSED: 12:55 P.M., January 12, 1976.

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CERTIFICATE OF REPORTER

I, Merry Ann Finch, U.S. Court Reporter, certify that acting in such capacity I reported the foregoing proceeding and the preceding pages numbered 1 through this page 22 are a true and accurate transcript of the proceeding which immediately followed a motion for mistrial and the granting of the same by Judge Owens at the time and place set forth.

WITNESS my hand, this 15th day of January, 1977.

/s/ MERRY ANN FINCH